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SHORT FORM ORDER

INDEX No. 13-11258

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 2-5-14 (#001)
MOTION DATE 3-4-14 (#002)
ADJ. DATE
Mot. Seq. # 001 - MD
002 - XMotD

---X

CITIMORTGAGE, INC., as successor by merger with Principal Residential Mortgage, Inc.,

Plaintiff,

- against -

SYLVAIN CHOUEN, J.P. MORGAN CHASE & CO., as successor by merger to NORTH AMERICAN MORTGAGE COMPANY, and CITIBANK, N.A.,

Defendants.

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Upon the following papers numbered 1 to 77 read on this motion to dismiss and cross motion for summary judgment ___; Notice of Motion/ Order to Show Cause and supporting papers 1 - 20 ; Notice of Cross Motion and supporting papers 21 - 72 ; Answering Affidavits and supporting papers 73 - 75 ; Replying Affidavits and supporting papers 76 - 77 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant Sylvain Chouen for an order pursuant to CPLR 3211 (a)(5), granting sanctions against plaintiff and its counsel, and costs and disbursements is denied; and it is further

ORDERED that this cross motion by plaintiff for an order pursuant to CPLR 3212 granting summary judgment in its favor quieting plaintiff's first mortgagee interest in the amount of $175,000.00 against the premises known as 571 Cadman Road, West Islip, New York with Tax Map number District

0500, Section 362.00, Block 02.00, Lot 049.00 as of November 11, 2002 and directing the Suffolk County Clerk to accept for recording against said premises plaintiff's $175,000.00 mortgage dated November 11, 2002, or in the alternative, for an order declaring that plaintiff is equitably subrogated to the first mortgage lien of Mortgage Electronic Registration Systems (MERS) as nominee for Homeside Lending previously recorded against said premises on August 6, 1993 in the amount of $152,616.52 as of November 11, 2002 is determined herein.

Defendant Sylvain Chouen (Chouen) granted a first mortgage on August 6, 1993 in the amount of $170,700.00 to Midcoast Mortgage Corporation against his premises known as 571 Cadman Road, West Islip, New York with Tax Map number District 0500, Section 362.00, Block 02.00, Lot 049.00. Said mortgage was recorded in the Suffolk County Clerk's Office on August 19, 1993 and was assigned to Atlantic Residential Mortgage Corporation on January 5, 1995 and then assigned to MERS on November 24, 1999 (MERS mortgage). Defendant Chouen granted a second mortgage in the sum of $66,000.00 on March 8, 2000 to The Dime Savings Bank of New York FSB which was recorded in the Suffolk County Clerk's Office on March 22, 2000 (Dime mortgage). The Dime mortgage, was assigned to North American Mortgage Company by assignment recorded in the Suffolk County Clerk's Office on June 21, 2000. North American Mortgage Company subsequently merged with Washington Mutual Bank, which was subsequently acquired by defendant J.P. Morgan Chase & Co. Then, on November 11, 2002, defendant Chouen granted a third mortgage in the amount of $175,000.00 to MERS as nominee for Principal Residential Mortgage, Inc. (Principal Residential mortgage) and $152,616.52 of the $175,000.00 loan was paid to MERS c/o Homeside Lending to satisfy the August 6, 1993 MERS mortgage. The original Principal Residential mortgage was lost or destroyed and thus was never recorded. Later, on December 11, 2006, defendant Chouen granted Citibank, N.A. a fourth mortgage in the amount of $200,000.00 that was recorded in the Suffolk County Clerk's Office on January 25, 2007 and a portion of the loan proceeds were used to satisfy the Dime mortgage, which satisfaction was recorded on August 13, 2007.

On April 20, 2011, Mortgage Electronic Registration Systems, Inc. (MERS) acting solely as nominee for Principal Residential Mortgage, Inc. commenced an action against defendant Chouen and the Office of the Suffolk County Clerk in the Supreme Court under Index number 13627-2011. In said action, MERS sought an order directing the Suffolk County Clerk to record the Principal Residential Mortgage. Said action was stayed upon the filing by defendant Chouen for Chapter 7 bankruptcy relief in the United States Bankruptcy Court for the Eastern District of New York and was subsequently discontinued. MERS assigned the Principal Residential mortgage to Citimortgage, Inc. on June 21, 2013.

Plaintiff, Citimortgage, Inc., as successor by merger with Principal Residential Mortgage, Inc., commenced this action on April 23, 2013. By its first cause of action in its complaint in this declaratory judgment action, plaintiff seeks to quiet title to its first mortgage lien on the subject property in the amount of $175,000.00 and by its second cause of action, plaintiff seeks to be equitably subrogated to the interests of MERS c/o Homeside Lending as assignee of the first mortgage in the amount of $152,616.52. Defendant Chouen's answer contains five affirmative defenses, including that plaintiff is estopped from quieting its mortgage interest in the subject premises based on the discharge injunction in the discharge order of the Bankruptcy Court and that plaintiff lacks standing to bring this action.

Defendant Chouen moves for dismissal of the action pursuant to CPLR 3211 (a)(5) on the ground that his Citimortgage debts were discharged by the United States Bankruptcy Court for the Eastern District of New York by decision dated February 7, 2012. Defendant avers in his affidavit in support that "[o]n or about November 11, 2002, and in order to secure the sum of $175,000.00, I executed a Note and Mortgage to MERS, as nominee for principal residential mortgage," that he filed a voluntary petition in bankruptcy under Chapter 7 of the United States Bankruptcy Code on October 29, 2011 with the United Stated Bankruptcy Court for the Eastern District of New York listing Citimortgage as a creditor, and that "[o]n February 7, 2012, the Bankruptcy Court entered an Order discharging me of all debts which were filed by or against me as of October 29, 2011, the date of filing."

Plaintiff now cross-moves for summary judgment to quiet title to its first mortgage lien on the subject property in the amount of $175,000.00 and an order directing that the Suffolk County Clerk accept for recording a copy of the Principal Residential mortgage dated November 11, 2002. In the alternative, plaintiff seeks equitable subrogation. Plaintiff submits, among other things, copies of defendant Chouen's deed to the subject premises, copies of the aforementioned mortgages, assignments and satisfaction of mortgages, the discharge of debtor order of final decree of the United States Bankruptcy Court for the Eastern District of New York, and the affidavit of Patrick J. Kelley, a vice president of plaintiff.

It is well settled that the party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Friends of Animals, Inc. v Associated Fur Mfrs., Inc.***, 46 NY2d 1065, 416 NYS2d 790 [1979]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (***S.J. Capelin Assocs., Inc. v Globe Mfg. Corp.***, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (***Benincasa v Garrubbo***, 141 AD2d 636, 637, 529 NYS2d 797,799 [2d Dept 1988]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (***Alvarez v Prospect Hosp.***, 68 NY2d at 324, 508 NYS2d 923, citing to ***Zuckerman v City of New York***, 49 NY2d at 562, 427 NYS2d 595).

The United States Supreme Court case entitled ***Johnson v Home State Bank***, 501 US 78, 83, 111 SCt 2150 (1991) provides guidance on the nature of the mortgage interest that survives a Chapter 7 liquidation:

> A mortgage is an interest in real property that secures a creditor's right to repayment. But unless the debtor and creditor have provided otherwise, the creditor ordinarily is not limited to foreclosure on the mortgaged property should the debtor default on his obligation; rather, the creditor may in addition sue to establish the debtor's in personam liability for any deficiency on the debt and may

> enforce any judgment against the debtor's assets generally. See 3 R. Powell, The Law of Real Property ¶ 467 (1990). A defaulting debtor can protect himself from personal liability by obtaining a discharge in a Chapter 7 liquidation. See 11 U.S.C. § 727. However, such a discharge extinguishes only "the personal liability of the debtor." 11 U.S.C. § 524 (a)(1). Codifying the rule of Long v. Bullard, 117 U.S. 617, 6 S.Ct. 917, 29 L.Ed. 1004 (1886), the Code provides that a creditor's right to foreclose on the mortgage survives or passes through the bankruptcy. See 11 U.S.C. § 522(c)(2); Owen v. Owen, 500 U.S. 305, 308-309, 111 S.Ct. 1833, 1835-1836, 114 L.Ed.2d 350 (1991); Farrey v. Sanderfoot, 500 U.S. 291, 297, 111 S.Ct. 1825, 1829, 114 L.Ed.2d 337 (1991); H.R.Rep. No. 95-595, supra, at 361.

Thus, "a bankruptcy discharge extinguishes only one mode of enforcing a claim-namely, an action against the debtor in personam-while leaving intact another-namely, an action against the debtor in rem" (***Johnson v Home State Bank***, 501 US 78, 84). It so follows that the Chapter 7 discharge extinguished defendant Chouen's personal obligation under the November 11, 2002 promissory note in the amount of $175,000.00 but did not eradicate plaintiff's security interest against the subject property. Therefore, the motion to dismiss this action based on discharge in bankruptcy is denied in its entirety.

To establish title by a lost deed or a lien by a lost mortgage there must be clear and certain evidence showing that the deed or mortgage was properly executed with all the formalities required by law and a showing of the contents of such instrument (***Sadow v Poskin Realty Corp.***, 63 Misc 2d 499, 312 NYS2d 901 [Sup Ct, Queens County 1970] citing ***Edwards v Noyes***, 65 NY 125, 127 [1875]; ***City of Oneida v Drake***, 133 Misc 382, 385-386, 232 NYS 248, 251-252 [Sup Ct, Madison County 1928]). The failure to record the mortgage does not render the mortgage and note unenforceable (*see* ***Commonwealth Land Tit. Ins. Co. v Lituchy***, 161 AD2d 517, 518, 555 NYS2d 786 [1st Dept 1990]; *see also* Real Property Law § 291; ***Hopper v Lockey***, 17 AD3d 912, 795 NYS2d 103 [3d Dept 2005]; ***Commonwealth Land Title Ins. Co. v Lituchy***, 188 AD2d 353, 591 NYS2d 770 [1st Dept 1992], *lv denied* 81 NY2d 706, 597 NYS2d 936 [1993]). However, "New York has a "race-notice" recording statutory scheme" (*see* ***Alliance Funding Co. v Taboada***, 39 AD3d 784, 784, 832 NYS2d 814 [2d Dept 2007]; Real Property Law § 291). " 'Under New York's Recording Act (Real Property Law § 291), a mortgage loses its priority to a subsequent mortgage where the subsequent mortgagee is a good-faith lender for value, and records its mortgage first without actual or constructive knowledge of the prior mortgage' " (***Rite Capital Group, LLC v LMAG, LLC***, 91 AD3d 741, 743, 936 NYS2d 280 [2d Dept 2012], *lv to appeal dismissed* 19 NY3d 992, 951 NYS2d 107 [2012], quoting ***Washington Mut. Bank, FA v Peak Health Club, Inc.***, 48 AD3d 793, 797, 853 NYS2d 112 [2d Dept 2008]; *see* ***Mortgage Elec. Registration Sys., Inc. v Rambaran***, 97 AD3d 802, 803-804, 949 NYS2d 694 [2d Dept 2012]).

Here, plaintiff submits a copy of the November 11, 2002 Principal Residential mortgage which is uncertified. Even if a certified copy of said mortgage was provided, an order directing that the certified copy of the mortgage be recorded nunc pro tunc to the date of the original execution would constitute unprecedented relief running contrary to Real Property Law § 291 as well as the expectations of bona fide purchasers for value (*see* ***Reynolds v Springer Serv. Sta., Inc.***, 151 AD2d 466, 542 NYS2d 256 [2d Dept 1989]; ***Wells Fargo Bank, NA v Perry***, 23 Misc 3d 827, 830-831, 875 NYS2d 853 [Sup Ct, Suffolk County 2009]). Therefore, plaintiff's request to quiet title to its first mortgage lien on the

subject property in the amount of $175,000.00 and an order directing that the Suffolk County Clerk accept for recording a copy of the Principal Residential mortgage dated November 11, 2002 is denied.

The doctrine of equitable subrogation applies "where the funds of a mortgagee are used to satisfy the lien of an existing, known incumbrance when, unbeknown to the mortgagee, another lien on the property exists which is senior to his but junior to the one satisfied with his funds. In order to avoid the unjust enrichment of the intervening, unknown lienor, the mortgagee is entitled to be subrogated to the rights of the senior incumbrance" (***King v Pelkofski***, 20 NY2d 326, 333-334, 282 NYS2d 753 [1967]; *see* ***Arbor Commercial Mtge., LLC v Associates at the Palm, LLC***, 95 AD3d 1147, 1149, 945 NYS2d 694 [2d Dept 2012]).

Here, plaintiff established its prima facie entitlement to judgment as a matter of law for the imposition of an equitable lien on the subject property in the amount of the proceeds of the November 11, 2002 Principal Residential loan that was allocated to satisfy the August 6, 1993 MERS mortgage, that is $152,616.52 of the $175,000.00 loan (*see* ***Harris v Thompson***, 117 AD3d 791, 985 NYS2d 713, 715 [2d Dept 2014]; ***LaSalle Bank Natl. Assn. v Ally***, 39 AD3d 597, 835 NYS2d 264 [2d Dept 2007]). Defendant Chouen admitted by affidavit that he executed the MERS note and mortgage on or about November 11, 2002 to secure the sum of $175,000.00, and plaintiff submitted a copy of the November 11, 2002 Principal Residential mortgage signed by defendant Chouen, the satisfaction of the MERS mortgage dated January 3, 2003 and recorded in the Suffolk County Clerk's Office on March 15, 2004, the assignment of the Principal Residential mortgage to plaintiff on June 21, 2013, and the HUD-1 settlement statement dated November 11, 2002 signed by defendant Chouen as documentary evidence to show that a portion of the November 11, 2002 Principal Residential loan proceeds, $152,616.52, had satisfied the August 6, 1993 MERS mortgage (*see id.*).

Only defendant Choen submitted opposition to the cross motion. He argues that plaintiff lacks standing to quiet its interest inasmuch as plaintiff was assigned the Principal Residential mortgage two months after the commencement of this action and thus was not the holder and owner of the mortgage at the time that the action was commenced. To have standing to maintain an action to quiet title pursuant to RPAPL 1501, a party must have an estate or interest in the property at the time that the action is commenced (*see* ***Lennard v Chinkpoo Realty Holding Corp.***, 76 AD3d 1052, 909 NYS2d 456 [2d Dept 2010]; ***Soscia v Soscia***, 35 AD3d 841, 829 NYS2d 543 [2d Dept 2006]). RPAPL 1501 (5) provides that "[t]he interest had by any mortgagee or contract vendee of real property or by any successor in interest of either of them, is an 'interest in real property' as that phrase is used in this article of the real property actions and proceedings law." If the plaintiff is not the original lender and standing is at issue, the plaintiff must provide evidence that it received both the mortgage and note by a proper assignment, which can be established by the production of a written assignment of the note, or by physical delivery to the plaintiff of the mortgage and note (*see* ***Wells Fargo Bank, N.A. v Ali***, 2014 NY Slip Op 07653 [2d Dept 2014]; ***Midfirst Bank v Agho***, 121 AD3d 343, 991 NYS2d 623 [2d Dept 2014]; ***Kondaur Capital Corp. v McCary***, 115 AD3d 649, 981 NYS2d 547 [2d Dept 2014]; ***Aurora Loan Services, LLC v Taylor***, 114 AD3d 627, 980 NYS2d 475 [2d Dept 2014]). Here, plaintiff was assigned the Principal Residential mortgage subsequent to the commencement of this action. However, Patrick J. Kelley, a vice president of plaintiff, avers in his affidavit in support of the cross motion that "[t]he promissory note in the amount of $175,000, signed by Chouen on November 11, 2002, was endorsed and delivered

to plaintiff prior to the commencement of the action. Plaintiff is currently the holder of the promissory note." Once a promissory note is tendered to and accepted by an assignee, the mortgage passes as an incident to the note (*see* ***HSBC Bank USA, Natl. Assn. v Gilbert***, 120 AD3d 756, 991 NYS2d 358 [2d Dept 2014]; ***Bank of N.Y. v Silverberg***, 86 AD3d 274, 926 NYS2d 532 [2d Dept 2011]). Plaintiff thus established its standing and defendant Chouen failed to offer any contradictory evidence or to raise a triable issue of fact (*see* ***Wells Fargo Bank, N.A. v Arias***, 121 AD3d 973, ___ NYS2d ___ [2d Dept 2014]; ***Aurora Loan Services, LLC v Taylor***, 114 AD3d 627, 980 NYS2d 475 [2d Dept 2014]). Therefore, the cross motion is granted to the extent that, and the Court declares that, plaintiff is equitably subrogated to the first mortgage lien of Mortgage Electronic Registration Systems (MERS) as nominee for Homeside Lending recorded against said premises on August 6, 1993 in the amount of $152,616.52 as of November 11, 2002.

Dated: Dec. 4, 2014

W. Gerard Asher
J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**